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No. 95-1232

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ROGER W. TRACY,
TAX COMMISSIONER OF OHIO,
Respondent.

On Writ of Certiorari to the
Supreme Court of Ohio

BRIEF OF THE STATES OF KANSAS, CALIFORNIA, CONNECTICUT, ILLINOIS, NEVADA, NORTH DAKOTA, VIRGINIA AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amicus State of Kansas and other *amici* States write to urge the Court not to abandon its traditional deference to the States' exercise of police powers in separately regulating and taxing the local distribution of vital commodities such as natural gas. Currently all 50 States regulate the business of local natural gas distribution, which is performed by regulated utilities usually called "local distribution companies" ("LDCs").[1] Such regulation universally imposes

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[1] State statutes that specifically provide for regulation of sales of natural gas include: Ala. Code §§ 37-4-80, 37-4-83 (1995); Del. Code Ann. tit. 26, §§ 102, 201 (1990); D.C. Code Ann. § 43-1001(3) (1996); Fla. Stat. ch. 366.02, 366.03, 366.14 (1995); Ga. Code Ann. § 46-1-1(15), 46-2-20(a), 46-2-21, 46-2-23(a) (1996); Iowa Code § 476.1(1) (1995); Ky. Rev. Stat. Ann. §§ 278.010, 278.040, 278.495 (Michie 1989); La. Rev. Stat. Ann. §§ 45-301, 45-302 (West 1982); Md. Ann. Code §§ 78-1, 78-2 (1957); Mich. Stat. Ann. § 460.6 (Callaghan 1995); Miss. Code Ann. §§ 77-3-3, 77-3-5 (1991); Minn. Stat. Ann. § 216B.045 (1995); Neb. Rev. Stat. § 19-4603 (1995); Nev. Rev. Stat. § 704.075 (Michie 1995); N.H. Rev. Stat. Ann. §§ 362:2,374:3 (1995); N.J. Rev. Stat. § 48:9-17 (1994); N.C. Gen Stat. §§ 62-3 (23), 62-30 (1995); Ohio Rev. Code Ann. § 4933.01 (Baldwin 1991); R.I. Gen. Laws §§ 39-1-2(7), 39-1-3 (1995); S.C. Code Ann. §§ 58-5-10, 58-5-210 (Law co-op. 1993); Tex. Rev. Civ. Stat. Ann. art. 1446c, 1446e (West 1980) ; Utah Code Ann. §§ 54-2-1(8), 54-4-1 (1995); Wash. Rev. Code Ann. §§ 80.04.010,80.04.015 (1995); W. Va. Code § 24-2-1 (1996); Wis. Stat. §§ 196.01, 196.02- 196.03 (1994); Wyo. Stat. §§ 37-1-101, 37-2-112 (1996).

State statutes providing for general power to regulate public utilities include:Alaska Stat. §§ 42.05.141, 42.05.291 (1995); Ariz. Rev. Stat. Ann. §§ 40-201(4), 40-203 (1995); Ark. Code Ann. §§ 23-15-203, 23-15-204 (Michie 1995); Cal. Public Utilities Code § 701 (Deering 1990); Colo. Rev. Stat. §§ 40-1-103, 40-2-108 (1995); Conn. Gen. Stat. §§ 16-270, 16-271 (1994); Haw. Rev. Stat. §§ 269-1, 269-6 (1996); Idaho Code §§ 61-129, 61-301, 61-303 (1996); Ill. Ann. Stat. ch. 220, para. 5/3-105, 5/4-101 (1993); Ind. Code Ann. § 8-1-2-1 (Burns 1996); Kan. Stat. Ann. §§ 66-104, 66-1,185, 66-1,204 (1993); Mass. Ann. Laws ch. 164 §§ 1,

public service requirements upon LDCs that include comprehensive rate regulation.

Although rate regulation constitutes perhaps the best known feature of public utility regulation, it forms only one aspect of State involvement in supervising the local distribution business. That supervision traditionally involved the grant of a monopolistic franchise along with attendant powers--such as eminent domain authority--to carry out the purposes of the franchise. On the other hand, the States would impose constraints in the form of rate regulation and other defined public service obligations.

Because the character of local distribution as a regulated monopoly virtually assured returns on investment and insulated utility investors from competitive enterprise, the States and their subdivisions regularly imposed special tax burdens on utilities to meet various needs of the public fisc. This Court repeatedly upheld such exactions against equal protection challenges, recognizing the legitimate State objectives in separately regulating and taxing the activities of utilities and common carriers.

Of the 50 States, 31 States have enacted separate taxation structures that reflect the regulated and monopolistic

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93, 94 (Law. Co-op. 1988); Me. Rev. Stat. Ann. tit. 35-A, §§ 102-103 (West 1982); Mo. Rev. Stat. § 393.010 (1995); Mont. Code Ann. §§69-3-101,69-3-102 (1995); N.M. Stat. Ann. § 68-3-2(F)(2) (1974); N.Y. Public Utilities Law § 47-65(Consol. 1995); N.D. Cent. Code §§ 49-02-01, 49-02-02 (1995); Okla. Stat Ann. tit. 17, §§ 151-152 (West 1987); Or. Rev. Stat. §§ 50-757.005, 50-756.040 (1995); 66 Pa. Cons. Stat. Ann. §§ 102,501 (1993); S.D. Codified laws Ann. §§ 49-34A-2, 49-34A-4 (1993); Tenn. Code Ann. §§ 65-4-101, 65-4-117 (1993); Vt. Stat. Ann. tit. 30, §§ 201, 203 (1987); Va. Code Ann. §§ 56-1, 56-2, 56-232, 56-232.2 (1995).

character of LDC business,[2] including at least 8 States like Ohio that subject LDCs to a significantly higher burden of personal property taxation.[3] Five States and the District of

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[2] The statute cites for States with generally separate tax structures includes the following: Ala. Code § 40-21-80 (1995), Alaska Stat. § 43.55.016 (1995), Colo. Rev. Stat. Ann. §§ 39-4-101, -102 (West 1990), Conn. Gen. Stat. Ann. § 12-264 (West 1990), Del. Code Ann. tit. 30, §§ 5501, 5502 (1985), Fla. Stat. Ann. § 203.01 (West 1993), Ga. Code Ann. § 48-5-510 et seq. (Harrison 1984), Haw. Rev. Stat. § 239-5 (1994), Idaho Code § 63-701 (1994), Ill. Rev. Stat. ch. 220, para. 5/2-202 (1993), Ind. Code Ann. § 6-1.1-8-1 et seq. (West 1978), Iowa Code Ann. § 438.1 et seq. (West 1992), La. Rev. Stat. Ann. § 47:1031 (West 1982), Me. Rev. Stat. Ann. tit. 36, § 1811 (West 1964), Md. Code Ann., Tax-Gen. §§ 8-401, -402 (1973), Mass. Gen. Laws Ann. ch. 63, § 52A (Law. Co-op. 1991), Minn. Stat. Ann. § 216B.36 (West 1995), Mont. Code Ann. § 15-6-137 (1995), N.J. Stat. Ann. § 54:30A-1 et seq. (West 1983), N.M. Stat. Ann. § 7-33-1 (Michie 1978), N.Y. Tax Law § 186-a (McKinney 1987), N.C. Gen. Stat. § 105-116 (1994), Okla. Stat. Ann. tit. 68, §§ 2847, 2852 (West 1993), Pa. Stat. Ann. tit. 72, § 8101 (1990), R.I. Gen. Laws § 44-13-1 (1995), Tenn. Code Ann. § 67-4-405 (1995), Tex. Tax Code Ann. § 182.021 (West 1992), Va. Code Ann. §§ 58.1-2600, 2620 (Michie 1991), Wash. Rev. Code Ann. § 82.16.020 (West 1994), W. Va. Code § 11-13-2d (1995).

[3] Ala. Code § 40-1-1 et seq. (1975) (utilities pay not only a gross receipts tax, but utility property is assessed at 30%, while other non-utility property is assessed at 20% or less);Ariz. Rev. Stat. Ann. § 42-101 et seq. (1996) (utility property is assessed at a ratio of 30%, while other commercial or industrial non-utility property is assessed at 25%); Kan. Const. art. 11, § 1 (1995) (utility property is assessed at ratio of 33%, while commercial property is assessed at 25%); La. Rev. Stat. Ann. § 47:1854 (West 1963) (public service property is assessed at ratio of 25%; non-utility at 15%); Miss. Code Ann. § 27-31-1 et seq. (1996) (public utility property assessed at ratio of 30%, non-utility and railroad at 15%); Mont. Code Ann. § 15-6-141 (1995) (centrally-assessed utility property at 12%; non-utility and other non-centrally assessed utility property ranges from 3 - 9%); Pa. Stat. Ann. tit. 72, § 8101-A et seq. (1990) (utility property is not assessed locally; instead a statewide public utility realty tax, PURTA, is levied on utility real property, with rate of 30 mills to the dollar; additional realty tax at 12 mills imposed at end of

Columbia at present draw distinctions between purchases from LDCs and purchases from unregulated, private businesses that might be called into question by the challenge made in this case.[4] The States' foremost concern in this case is that a decision of this Court invalidating these traditional distinctions would impose significant forfeitures upon State treasuries. Moreover, it would be particularly disruptive for this Court to render a decision that calls into question any treatment of LDCs distinct from private businesses.

Contrary to suggestions of General Motors and the *amici* supporting its position, the deregulation of interstate pipeline business at the federal level does not imply any need to activate the dormant commerce clause to effect similar deregulation at the level of local distribution. Not only has Congress granted and never withdrawn its express statutory

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preceding calendar year); Tenn. Code Ann. § 67-1-201 et seq. (1995) (real property of utility assessed at 55%, non-utility at 40%; personalty of utility at 55%, non-utility at 30%).

[4] The statute cites for States which similarly distinguish between purchases of natural gas from marketers and purchases from public utilities include the following: Ala. Code §§ 40-23-4(8), 40-23-62(10)(1995); Conn. Gen. Stat. § 12-412 (1994); D.C. Code Ann. §§ 47-2005(24), 47-2206 (1996); Ind. Code Ann. §§ 6-2.5-5-16 (Burns 1996); Kan. Stat Ann. § 79-3606(f)(1993); Md. Code Ann., Tax-Gen § 11-207(2). In addition, numerous States exempt sales to residential consumers, which currently are virtually the exclusive province of LDCs.

endorsement of State regulation in this regard,[5] but other considerations show the legitimate State interests that continue to undergird Congress' determination.

The States are committed to deriving each and every benefit that may be obtained from loosening the traditional bonds of regulation. But deregulation at the level of local distribution is not only fraught with challenges different from those faced in deregulating interstate pipeline business, but has been profoundly affected by the very fact of deregulation at the federal level. It is widely acknowledged that the average residential consumer has not shared in the lower-cost boons of deregulation to date. Less clear is what structures will both contain costs and assure service to each and every residential consumer on the coldest day of the year.

Moreover, the pursuit of regulatory objectives has led to special structuring of the business of local distribution, which clearly demarcates it as a separate business from the ordinary private business engaged in by the marketers from whom General Motors purchased in this case. Specifically, rate regulation and the requirement to serve the general public--including the obligation to reserve adequate commodity and pipeline capacity to serve consumers on demand on the coldest day of the year--mean that a utility consumer pays a price reflecting the total costs of utility service. Unlike General Motors' commodity purchases from marketers, the utility service price bundles together (i) acquisition cost of gas to the utility; (ii) cost of interstate pipeline capacity, including ratable share of enhanced cost of the assuring service at peak demand; and (iii) other public service costs, such as payment to help defray losses from

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[5] Under the Natural Gas Act, Congress expressly granted authority to States to regulate the local distribution aspect of the natural gas industry. See 15 U.S.C. §717(c).

sales to poor customers unable to pay full price.

The States do not contend that they constitutionally may engage in genuine discrimination against interstate commerce. They only seek deference to their legislative and administrative efforts to protect the legitimate needs of their citizens by exercising long-standing and well-recognized powers to distinguish between the regulated business of local distribution and other private businesses.

SUMMARY OF ARGUMENT

Numerous decisions of this and lower courts have upheld the rational basis for making precisely the distinction Ohio law makes here between regulated utilities and unregulated private businesses. No subsequent development justifies calling such well-settled doctrine into question.

Specifically, the fact of interstate pipeline deregulation at the federal level represents a trend which the States themselves are attempting to follow without sacrificing the legitimate traditional goals of regulating local distribution. Not only do the particular exigencies associated with local distribution continue to raise troubling questions in the context of deregulation, but the process of deregulation itself may necessitate new measures that distinguish between LDCs and private marketing enterprises. Indeed, the imposition of charges or other burdens on marketer transactions may become a necessary piece of the deregulation process.

ARGUMENT

States Traditionally Have Distinguished Between Public Utilities And Private Businesses For Both Regulatory And Taxation Purposes.

General Motors asserts violations of both the equal protection and commerce clauses of the Constitution because Ohio distinguishes between sales of natural gas by unregulated marketers and regulated LDCs. These contentions must overcome decisions of by this Court long establishing the validity of such distinctions. First, this Court has recognized that, because the States' taxation power constitutes such a fundamental aspect of their sovereignty, special deference is due to the manner in which the State exercises that power. The States' power to tax has been acknowledged to be "the most basic power of government." *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1941). This has led the Court to reject routinely equal protection challenges to State taxes on the principle that "'[t]he States have a very wide discretion in the laying of their taxes." *Allied Stores of Ohio, Inc v. Bowers*, 358 U.S. 522, 526 (1959). Indeed, "[n]o 'iron rule of equality' between taxes laid by a State on different types of business is necessary." *State of Alaska v. Arctic Maid*, 366 U.S. 199, 231 (1961).

This Court repeatedly has recognized the rational basis for separate regulation and taxation of public service corporations such as utilities and common carriers. Thus, "'the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.'" *New Orleans Public Service, Inc. v. City of New Orleans*, 491 U.S. 350, 365 (1989), citing *Arkansas Elec. Co-operative Corp. v. Arkansas Pub. Serv. Comm'n*,

461 U.S. 375, 377 (1983); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 569 (1980) (holding that, under First Amendment standard for commercial speech regulation, "[t]he State's concern that rates be fair and efficient represents a clear and substantial governmental interest"). Moreover, the underlying regulatory interest of the States can furnish independent, rational grounds for specific tax measures. E.g., *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983) (upholding imposition of severance tax with pass-through-prohibition upon oil producers as to intrastate transactions) ("We conclude that the measures at issue here pass muster under this standard. The pass-through prohibition plainly bore a rational relationship to the State's legitimate purpose of protecting consumers from excessive prices. Similarly, we think the Alabama Legislature could have reasonably determined that the royalty-owner exemption would encourage investment in oil or gas production. Our conclusion with respect to the royalty-owner exemption is reinforced by the fact that that provision is solely a tax measure.").

The legitimate goals of utility regulation together with the structural reasons for deferring to State tax classifications account for the relative ease this Court has had in upholding separate taxation of public service corporations and utilities. E.g., *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 579 (1937) ("Since carriers or other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses, including relative freedom from competition, especially significant with increasing density of population and municipal expansion, these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions. Carriers may be treated as a separate

class [cites omitted] and, as such, taxed differently or additionally. [cites omitted] ..."); *Atlantic Coastline R. Co. v. Doughton*, 262 U.S. 413, 423-24 (1923) ("The state might, consistently with the equal protection clause, have subjected only public service corporations to the income tax, or it might have laid upon them a higher income tax than upon others, as it laid upon railroads a higher franchise tax than it did upon other corporations.").

In light of this jurisprudence, it is very late in the day for General Motors to assert that distinguishing between taxation of marketer sales and LDC sales has no rational basis. What General Motors needs is some way to make old, settled questions appear to be new. Realizing this, General Motors and the amici supporting its position try two strategies: (i) they dress up the equal protection argument as a commerce clause argument; and (ii) they suggest that the process of deregulation somehow strips settled classifications of rationality.

1. The Public Service Business Of Local Distribution Is A Distinct Business From The Private Business Of Marketing The Bare Commodity Of Natural Gas.

The distinction between (i) a local distribution business and (ii) a selling business not involving local distribution is not, as General Motors suggests, discrimination against interstate commerce, but a distinction between two separate businesses. This is so because facial commerce clause discrimination requires a "geographic distinction" which establishes that a tax measure "patently discriminates" against interstate commerce. *Oregon Waste Systems v. Dep't of Environmental Quality*, 128 L.Ed.2d 13,

22 (1994). The method for showing a "geographic distinction" is set forth in the preceding sentence in *Oregon Waste Systems*: the differential charge in that case "favor[ed] shippers of Oregon waste over their counterparts handling waste generated in other States." *Id.* In short, the Oregon waste--"local" waste--had an out-of-State "counterpart" that alone was subject to surcharge. The surcharge was therefore a classification based upon a geographic distinction.

General Motors cleverly uses the term "local" utility to suggest that the same situation is present here, but this is only a semantic game. A classification distinguishing "local" distribution is not a geographic distinction, because there is no "counterpart" for that distribution activity outside the State. Thus the classification does not favor an in-state activity at the expense of an out-of-state counterpart. A public natural gas utility is referred to as a "local distribution company," but this does not mean a "distribution company" that could just as easily operate "out-of-State." To the contrary: it means a company that engages in the unique and heavily regulated business of "local distribution" of an essential commodity. "Local" pertains to the level of distribution, not to the geographic identity of the company. Once the rules of the semantic game are revealed, it becomes clear that General Motors only raises an equal protection challenge--one to be rejected under the prior holdings of this Court.

In any event, no commerce clause discrimination exists unless a State law is shown to "impose[ ] a greater burden on out-of-state [interests] than it does on *similarly situated* [in-state interests]". *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (emphasis added). The unique character of the business of physically supplying gas arises both from the natural fact of owning and controlling pipelines that convey gas at a certain pressure to the burner

tip and from the legal fact that that business is heavily regulated by the States. Under both of these factors, the marketers General Motors purchased from are situated differently than LDCs. Because marketers and LDCs are identifiably different businesses, "no iron rule of equality" controls the manner in which the transactions may be taxed. E.g., *State of Alaska v. Arctic Maid*, 366 U.S. 199, 231 (1961). See also *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117,125-29 (1978) (no discrimination against interstate commerce based upon burden on distinct business of integrated oil companies even though such were all "out-of-State").

The difference between the local distribution business and the marketing business shapes the distinct nature of their respective sales transactions. A marketer sale is a sale of commodity (natural gas), and the sale price accordingly includes (i) the marketer's cost of acquiring gas; (ii) the marketers's profit on gas; and (iii) certain overhead costs. Like sales of tangible personal property generally, natural gas sales by marketers are subject to sales and use taxation under Ohio law. By contrast, purchasing gas from a utility means purchasing utility service--the price includes commodity (natural gas--sold at cost, since the utility is not permitted to profit on the commodity itself), plus capacity (space to transport gas on interstate pipeline), plus the utility's recovery of and return on investment in its own pipeline infrastructure, plus public service obligation costs.

The salient facts are these: (i) the utility incurs a substantially greater interstate pipeline cost because of its public service obligation to provide for "peak demand," with the result that utility customers must each help pay for that public service cost:--a cost that is "bundled" into the price of utility service; and (ii) the utility incurs additional public service costs, such as programs to defray the cost of

supplying natural gas to poor customers who cannot pay full price--which costs are also "bundled" in the service charge to utility consumers. Surely, such different business and distinct transactions merit different tax treatment. *Amerada Hess Corp. v. N.J. Taxation Div.*, 490 U.S. 66,78 (1989); *Artic Maid*, supra.

2. The "Unbundling" That Occurred In General Motors' Marketer Purchases Demonstrates The Continuing Rationality Of Separately Taxing Public Utilities.

General Motors suggests that the deregulation of interstate pipeline business at the federal level somehow creates a new constitutional bar to traditional state regulation of local distribution. Apparently, General Motors means to imply that federal deregulation instantaneously removed all traditional reasons for regulation and differential treatment by States. However, the commentators General Motors cites paint a more complicated picture:

> The PUCs confront a more daunting task than the FERC. Once the FERC creates the conditions in which markets can perform the functions of allocating and pricing gas and transportation capacity, it can simply step aside and allow those markets to function with little regulatory oversight. By contrast, the PUCs cannot realistically expect to create conditions in which competitive markets will yield acceptable results with respect to all LDC transactions. *At a minimum, provision of distribution service to small volume consumers is likely to remain a classic natural*

monopoly function for the foreseeable future. The PUCs retain the important role of protecting small consumers from potential abuse by monopolistic LDCs. Yet the PUCs cannot perform this role effectively through the use of traditional cost-of-service regulation with its reliance on inherently arbitrary allocations of common costs. The LDCs have limited market power with respect to most large consumers. Those consumers have access to competitive alternatives at varying and constantly changing prices. If a PUC insists that an LDC charge its large consumers rates determined through use of traditional cost-of-service methods, including some specified allocation of common costs, it will create a situation in which all affected parties lose. ...

... [T]he PUCs need to create incentives for the LDCs to minimize their total costs and to charge prices that maximize large consumers' contributions to common costs in order to minimize the costs that must be borne by small customers. It is not easy to devise a regulatory system that furthers all of these goals simultaneously. ... This difficult step in the transition will not be completed for many years and will have to proceed primarily by trial and error.

[R. Pierce, *The State Of The Transition To Competitive Markets In Natural Gas And Electricity*, 15 Energy L. Rev. 323, 327-28 (1994) (emphasis added).].

Federal deregulation of interstate pipeline business has itself raised new challenges at the level of local distribution.

> ...Occupying the last link in the natural gas distribution chain, end-users purchase gas on the intrastate market from the local distribution companies. The fixed costs which the LDCs incur in purchasing gas from the regulated pipelines and then reselling it to end-users was typically spread throughout their customer base (subject of course to the applicable local regulations). Under the system of "open access" however, the larger industrial end-users opted to pursue more competitively priced alternatives. ... The loss of these large "switchable" customers left the "captive" users to absorb the LDC costs as reflected in the gas rate. Such users, usually smaller industrial units or individual residences, had neither the means nor the flexibility to bypass the LDC market. Forced to receive gas from the LDCs, these remaining "captives" were exposed to large scale increases in their gas rates because they were the end-user least able to respond to price changes. Perhaps in the long run, these prices will ultimately decrease as a competitive natural gas market forces sellers to lower rates. In the meantime, however, consumers are sure to be harmed if rates increase with the lifting of regulatory controls.
>
> ...
>
> Organizations representing small customers have responded quickly to Order No. 636.

> Generally, their concerns reflect the belief that this segment of the industry is the least able to take advantage of the opportunities presented by open-access. This inherent inflexibility will not only deny captive customers the benefits of the new competitive marketplace, it will also shift onto them a disproportionate share of the transition burden. ...
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> [J. Fagan, *From Regulation To Deregulation: The Diminishing Role Of The Small Consumer Within the Natural Gas Industry*, 29 Tulsa L. Rev. 707, 723, 727 (1994).]

General Motors' marketer purchases in this case demonstrate the points made by the commentators. By purchasing from marketers, General Motors escaped the gross receipts tax that Ohio imposes upon utility sales (which is passed through to the consumer), but incurred the use tax. Avoiding a double taxation burden on utility sales was unquestionably the original purpose of the sales and use tax exemption General Motors is challenging. The advent of marketer purchases in the 1980's vastly strengthened this rationale for exempting utility purchases. In its marketer purchases, General Motors "unbundled" its interstate pipeline capacity costs from its purchase price--the figure upon which the use tax is calculated--while at the same time evading any share of additional public service cost. By contrast, utility customers pay for these extra public service charges, and also pay the passed-through gross receipts tax on those extra charges. This situation raises the very "captive consumer" problem referred to by the commentators, whereby marketers skim off the "cream" of large, paying customers and leave behind an ever diminishing base to fund the public service functions of the utility.

The States clearly need flexibility in dealing with this situation, but General Motors in effect asserts in this case that any flexibility is unconstitutional. The *amici* States respectfully submit that their sovereign powers encompass the authority to ensure that their residents do not freeze to death in the winter. There is no constitutional bar to the exercise of such State authority where, as here, such measures place absolutely no added burden on commerce that happens to cross state lines, or in any way disfavor a product or service that happens to originate out-of-State.

CONCLUSION

For all the foregoing reasons, the *amici* States request the Court to affirm the decision of the Ohio Supreme Court.

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